OHIO BOARD OF TAX APPEALS

SMK INDUSTRIES, LTD., (et. al.),

Appellant(s),

vs.

JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO, (et. al.),

Appellee(s).

CASE NO(S). 2017-703

(COMMERCIAL ACTIVITY TAX)

DECISION AND ORDER

APPEARANCES:

For the Appellant(s) - SMK INDUSTRIES, LTD.
Represented by:
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For the Appellee(s) - JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO
Represented by:
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Entered Monday, April 30, 2018

Mr. Harbarger, Ms. Clements, and Mr. Caswell concur.

Appellant SMK Industries Limited ("SMK") appeals to this board from a final determination of the Tax Commissioner affirming assessments of commercial activity tax ("CAT") for July 2005 through the second quarter of 2013. We proceed to consider the matter upon the notice of appeal, the statutory transcript ("S.T.") certified by the commissioner, and the commissioner's written legal argument.

Although SMK submitted written argument in support of its position through Texas attorney John Leeper, there is no indication that Mr. Leeper is an attorney registered in the state of Ohio, nor that Mr. Leeper has been granted permission to appear pro hac vice in the state of Ohio. Ohio Adm. Code 5717-1-02. Although SMK attempted to cure such defect by re-filing the written argument under the signature of its president, Enrique Cervantes, there is no indication that Mr. Cervantes is an attorney licensed to practice in Ohio, either. Accordingly, the written argument is hereby stricken from this board's consideration as the unauthorized practice of law. *Megaland GP, L.L.C. v. Franklin Cty. Bd. of Revision*, 145 Ohio St.3d 84, 2015-Ohio-4918, ¶19, fn.2, citing *Disciplinary Counsel v. Kafele*, 108 Ohio St.3d 283, 2006-Ohio-904, ¶14-15. See also *NASCAR Holdings, Inc. v. Testa*, Slip Opinion No. 2017-Ohio-9118.

After an audit, SMK was assessed by the Ohio Department of Taxation for unpaid commercial activity taxes on its actual gross receipts for July 2005 through December 2011, and its estimated gross receipts for

the remaining periods. SMK filed petitions for reassessment, asserting that it is not subject to the CAT, explaining:

> "SMK manufactures clothing. SMK's sales are typically 'F.O.B.', 6969-B Industrial Avenue, El Paso, Texas, the location of SMK's warehouse in El Paso, Texas. As such, the buyers acquire title to the merchandise in El Paso, Texas. The buyer (owner) is responsible for the payment of shipping costs and bear the risk of any loss. *** SMK's sales are completed in the state of Texas. SMK receives payment in the State of Texas. Title to the merchandise is transferred to the buyers in the state of Texas, not the state of Ohio. See R.C. 5751.033.3(E)('Gross receipts from the sale of tangible personal property shall be sitused to this state if the property is received in this state by the purchaser.'). SMK delivers the merchandise to the buyers in the state of Texas (specifically, its warehouse in El Paso), not the state of Ohio." S.T. at 40.

The commissioner affirmed the assessments, finding that SMK met the statutory requirements for "substantial nexus" with Ohio for purposes of the CAT, citing the Ohio Supreme Court's decision in *Crutchfield Corp. v. Testa*, 151 Ohio St.3d 278, 2016-Ohio-7760, and *Dupps Co. v. Lindley*, 62 Ohio St.32d 305 (1980). The commissioner further denied SMK's request for abatement of penalties.

On appeal to this board, SMK argues that it lacked bright line presence in Ohio during the periods at issue for purposes of the CAT, and incorporated the arguments previously made in it petitions for reassessment. Initially, we note that the commissioner argues that SMK has failed to properly specify error with regard to whether it has substantial nexus with Ohio under R.C. 5751.01, to the situsing of its gross receipts to Ohio under R.C. 5751.033(E), and to the abatement of any penalties. Upon review of the notice of appeal, we find that SMK properly raised the issues identified; however, we find SMK has failed to meet its burden to prove error in the commissioner's determinations in relation thereto.

In our review, we are mindful that the findings of the Tax Commissioner are presumptively valid. *Alcan Aluminum Corp. v. Limbach*, 42 Ohio St.3d 121 (1989). It is incumbent upon a taxpayer challenging a decision of the Tax Commissioner to rebut the presumption and establish a clear right to the relief requested. *Kern v. Tracy*, 72 Ohio St.3d 347 (1995); *Ball Corp. v. Limbach*, 62 Ohio St.3d 474 (1992); *Belgrade Gardens v. Kosydar*, 38 Ohio St.2d 135 (1974). The burden is on the taxpayer to present credible evidence to support its claim that an assessment is in error. *Kern*, supra; *May Co. v. Lindley*, 1 Ohio St.3d 6 (1982); *Federated Dept. Stores v. Lindley*, 5 Ohio St.3d 213 (1983).

Ohio imposes the CAT on taxpayers with substantial nexus with Ohio. R.C. 5751.02; R.C. 5751.01(H). Here, the Tax Commissioner found that SMK had nexus with Ohio by virtue of it having at least $500,000 of taxable gross receipts sitused to Ohio. R.C. 5751.01(I)(3). For sales of tangible personal property, R.C. 5751.033(E) provides the situsing rule:

> "Gross receipts from the sale of tangible personal property shall be sitused to this state if the property is received in this state by the purchaser. In the case of delivery of tangible personal property by motor carrier or by other means of transportation, the place at which such property is ultimately received after all transportation has been completed shall be considered the place where the purchaser receives the property. For purposes of this section, the phrase 'delivery of tangible personal property by motor carrier or by other means of transportation' includes the situation in which a purchaser accepts the property in this state and then transports the property directly or by other means to a location outside this state. Direct delivery in this state, other than for purposes of transportation, to a person or firm designated by a purchaser constitutes delivery to the purchaser in this state, and direct delivery outside this state to a person or firm designated by a purchaser does not constitute delivery to the purchaser in this state, regardless of where title passes or other conditions of sale."

SMK argues its gross receipts should not be sitused to Ohio and that, without such situsing, it lacks substantial nexus with Ohio and is not subject to the CAT. SMK focuses on the first sentence of R.C. 5751.033(E). Because its purchasers receive the property in Texas, it argues, its gross receipts should not be sitused to Ohio. In *Dupps Co.*, supra, the Ohio Supreme Court confronted the opposite argument in relation to the now repealed corporation franchise tax, which used a nearly identical situsing provision. Dupps was an Ohio-based manufacturer that argued that goods received by its customers at its facility in Ohio, and then transported outside Ohio, should be sitused outside Ohio. The court agreed, holding that "[s]ince the equipment herein was 'ultimately received' outside of Ohio, such sales should not have been' sitused to Ohio. Id. at 308. The court also addressed the situsing issue under the corporation franchise tax in *House of Seagram v. Porterfield*, 27 Ohio St.2d 97, 101 (1971), holding that "sales of tangible personal property to an Ohio buyer, delivered by the seller to a common carrier outside Ohio and ultimately received in Ohio after all transportation has been completed, are deemed business done in Ohio, *** regardless of whether the buyer or the seller has designated the common carrier." Our inquiry, therefore, is into the "ultimate destination" of the goods SMK sells.

This board has addressed a similar argument under the CAT in *Greenscapes Home & Garden Products, Inc. v. Testa* (July 19, 2017), BTA No. 2016-350, unreported, appeal pending, 10th Dist. No. 2017-AP-000593. In that case, the appellant was a Georgia-based wholesaler of lawn and garden products who sold products that ultimately were delivered to retailers in Ohio. Title to the goods sold passed to the customers at appellant's Georgia location, and were shipped based on the customers' pre-arranged transportation. We found that the receipts from such sales were properly sitused to Ohio: "At the time appellant sold products to its customers, it knew their ultimate destination to be Ohio, based on its customer's orders and the bills of lading it provided to the drivers transporting the products. Our inquiry ends here, as did the commissioner's, in the absence of any evidence indicating that goods were ultimately received elsewhere." Id. at 3.

Here, the assessments were based on SMK's gross receipts from sales showing Ohio "ship to" addresses on invoices provided by the taxpayer for July 2005 through December 2010, and estimated for periods thereafter. S.T. at 98-99. Aside from its argument that it is not subject to the CAT on constitutional grounds, SMK has provided no evidence to support its argument that it lacks substantial nexus with Ohio. We therefore find it has failed to meet its burden to prove error in the commissioner's final determination.

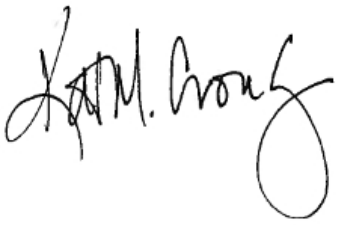
To the extent SMK has appealed the commissioner's denial of its request for abatement of the penalties imposed with the assessments, we likewise find that it has failed to meet its burden. The Supreme Court has held that "[r]emission of the penalty is discretionary. *** Appellate review of this discretionary power is limited to a determination of whether an abuse has occurred." *Jennings & Churella Constr. Co. v. Lindley*, 10 Ohio St.3d 67, 70 (1984). Further, in *Huffman v. Hair Surgeon, Inc.*, 19 Ohio St.3d 83 (1985), the court held "'"In order to have an 'abuse' in reach such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance therefore, not the exercise of reason but of passion of bias. ***" *State v. Jenkins* (1984), 15 Ohio St.3d 164, 222.'" Id. at 87. See also *Greenscapes*, supra, at 3. SMK has failed to demonstrate that any abuse occurred in this matter.

While we acknowledge SMK's constitutional arguments under the Commerce Clause, this board makes no findings with regard to such arguments, as such arguments may only be addressed on appeal by a court which has the authority to decide constitutional challenges. *MCI Telecommunications Corp. v. Limbach*, 68 Ohio St.3d 195 (1994); *Cleveland Gear Co. v. Limbach*, 35 Ohio St.3d 229 (1988).

Based upon the foregoing, we find that SMK has failed to meet its burden in this matter. Accordingly, the final determination of the Tax Commissioner is hereby affirmed.

BOARD OF TAX APPEALS		
RESULT OF VOTE	YES	NO
Mr. Harbarger		
Ms. Clements		
Mr. Caswell		

I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.



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Kathleen M. Crowley, Board Secretary